## SUBJECT INDEX


PAGE

I. Opinions below ..... 2

II. Findings below ..... 2

III. Grounds on which jurisdiction of this court is invoked..... 3

A. Nature of the proceeding and statutes pursuant to which it was brought..... 3

B. The Court of Appeals invalidated California state statutes as repugnant to the laws of the United States ..... 5

C. Failure of the Court of Appeals to expressly mention the California state statutes which it invalidated, does not nullify the jurisdiction of this court..... 7

D. Statutory provisions which confer jurisdiction of this appeal on this court..... 9

IV. Statutes involved ..... 10

(a) Text of California foreclosure statute which was invalidated ..... 10

(b) Text of California quiet title statutes which were invalidated ..... 10

(c) Text of repealed Acts of Congress which were held to invalidate existing California state statutes, even after repeal ..... 11

(d) Housing Act of 1954 removed all conflicts between California state statutes and Acts of Congress..... 12

V. Questions presented ..... 14

VI. Statement ..... 15

A. California state statutes protecting 38,000 homeowners and savings depositors against secret foreclosure are invalidated, and homeowners are threatened with foreclosure of trust deeds which have been fully paid ..... 15

PAGE

(1) Creation of $7,000,000 denied debt on which homeowners are threatened with foreclosure..... 15

(2) Homeowners pay loans in full into United States Court ..... 16

(3) Foreclosure threatened, despite tender of full payment twice made and rejected..... 16

(4) Homeowners directed by court to pay their loans to appellant association..... 17

(5) Appellees ask court to foreclosure on homeowners' notes and trust deeds, which are fully paid and discharged..... 18

(6) Disclaimer and quitclaim of appellees San Francisco Bank, et al., in favor of homeowners, repudiated ..... 18

B. 30,000 savings depositors are threatened with secret forclosure, despite tender of payment in full..... 19

(7) Terms of denied debt permit secret foreclosure ..... 19

(8) Appellees obtained original writs of mandamus and injunction from Court of Appeals, to nullify homeowners' quiet title judgments and defenses against foreclosure..... 19

(9) Congress acts to save homeowners and savings depositors from foreclosure..... 20

(10) Congressional power to save homeowners and savings depositors from foreclosure was expressly reserved in notes to be foreclosed and corporate charter of appellee Bank and appellant Savings Association..... 22

(11) Appellees asked, and Congress refused, to permit homeowners and savings depositors to be enjoined from defending against foreclosure.... 23

PAGE

(12) The Court of Appeals enjoins appellant homeowners and savings depositors from defending against foreclosure, despite Congressional repeal of authority so to do ..... 24

VII. The questions are substantial ..... 24

A. $7,000,000 foreclosure yet threatened, after payment in full, is a substantial question ..... 24

B. Secret foreclosure prior to trial and without redemption, violates public policy, and is a substantial question ..... 27

C. Invalidation of California state foreclosure and quiet title statutes, as repugnant to now repealed federal law, is a substantial question ..... 29

D. Nullification of Congressional reserved power to control the federal savings system, is a substantial question ..... 32

E. Repudiation of the power of Congress over jurisdiction of the federal courts, is a substantial question 33

F. Substitution of original writs of mandamus and injunction for undecided trials and appeals is a substantial question ..... 33

G. Vacating quiet title judgment for failure to exhaust unavailable administrative remedies, is a substantial question ..... 35

H. None of the questions presented by this appeal were involved in the 1953-54 denials of certiorari ..... 36

Conclusion ..... 37

Appendix reference and opinions below ..... Addenda

## TABLE OF AUTHORITIES CITED


| CASES | PAGE |
|---|---|
| Bankers Life & Casualty Co. v. Holland, 346 U. S. 379, 98 L. Ed. 106 (1953) | 34 |
| Beatty v. United States, 191 F. 2d 317 (C.A. 8, 1951) | 33 |
| Bernhardt v. Polygraphic Co., Oct. Term 1955, No. 49, decided Jan. 16, 1956, 100 Adv. L. Ed. 203 | 25 |
| Bulwer Consolidated Mining Co. v. Standard Mining Co., 83 C. 589, 23 P. 1102 (1890) | 25 |
| Collett, Ex Parte, 337 U. S. 55, 93 L. Ed. 1207 (1949) | 33 |
| Connett v. City of Jerseyville, 96 F. 2d 392 (C.A. 7, 1938) | 33 |
| Fahey, Ex Parte, 332 U. S. 258, 91 L. Ed. 2041 (1947) | 4, 34 |
| Fahey v. Calverly, 208 F. 2d 197 (C.A. 9, 1953) | 3, 21, 30 |
| Fahey v. Mallonee, 332 U. S. 245, 91 L. Ed. 2030 (1947) | 4 |
| Fahey v. O'Melveny & Myers, 200 F. 2d 420 (C.A. 9, 1952) | 3, 21, 30 |
| Federal Home Loan Bank of San Francisco v. Hall, 225 F. 2d 349 (C.A. 9, 1955) | 2 |
| Federal Home Loan Bank v. Long Beach Fed. S. & L. Ass'n., 122 F. Supp. 401 (D.C., S.D. Cal., 1954) | 2, 6, 25 |
| Federal Home Loan Bank v. Long Beach Fed. S. & L. Ass'n., 122 F. Supp. 960 (D.C., S.D. Cal., 1954) | 2 |
| Federal Reserve Bank v. Kalin, 77 F. 2d 50 (C.A. 4, 1935) | 33 |
| Ferris v. Frohman, 223 U. S. 424, 56 L. Ed. 492 (1912) | 8 |
| Gelfert v. National City Bank, 313 U. S. 221, 85 L. Ed. 1299 (1941) | 22, 30 |
| Harding, Ex Parte, 219 U. S. 363, 55 L. Ed. 252 (1911) | 34 |
| Helmholz v. Horst, 294 F. 417 (C.A. 6, 1924) | 32 |
| Home Building & L. Assoc. v. Blaisdell, 290 U. S. 398, 78 L. Ed. 413 (1934) | 22 |
| Home Loan Bank Board v. Mallonee, 196 F. 2d 336 (C.A. 9, 1952) | 3, 4, 21, 30 |

PAGE

Hovey v. Elliott, 167 U. S. 409, 42 L. Ed. 215 (1897) ..... 36

Joint Anti-Fascist v. McGrath, 341 U. S. 123, 95 L. Ed. 817 (1951) ..... 36

Lowe v. Ozmun, 3 C. A. 387, 86 P. 729 (1906) ..... 28

Mallonee v. Fahey, 68 F. Supp. 418 (D.C., S.D. Cal., 1946) ..... 4

Mallonee v. Fahey, 117 F. Supp. 259 (D.C., S.D. Cal., 1953) ..... 2, 6, 25

McCarroll v. Dixie Greyhound Lines, Inc., 309 U. S. 176, 84 L. Ed. 683 (1940) ..... 10

Missouri Pacific Ry. Co. v. United States, 189 U. S. 274, 47 L. Ed. 811 (1903) ..... 33

Monsen, In re, 74 F. 2d 411 (C.A. 7, 1934) ..... 33

New York, ex rel. Bryant v. Zimmerman, 278 U. S. 63, 73 L. Ed. 184 (1928) ..... 9

Norris v. Alabama, 294 U. S. 587, 79 L. Ed. 1074 (1935) ..... 8

Ott v. Mississippi Valley Barge Line Co., 336 U. S. 169, 93 L. Ed. 585 (1949) ..... 9

Park Square Auto etc, Ex Parte, 244 U. S. 412, 61 L. Ed. 1231 (1917) ..... 34

Roche v. Evaporated Milk Assn., 319 U. S. 21, 87 L. Ed. 1185 (1943) ..... 34

Roe, Ex Parte, 234 U. S. 70, 58 L. Ed. 1217 (1914) ..... 34

Rowland, Ex Parte, 104 U. S. 604, 26 L. Ed. 861 (1882) ..... 34

Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 51 L. Ed. 681 (1907) ..... 9

Silurian Oil Co. v. Essley, 54 F. 2d 43 (C.A. 10, 1932) ..... 33

Sinking Fund Cases (Union Pacific R.R. v. United States, 99 U. S. 700, 25 L. Ed. 496; Central Pacific R.R. v. Gallatin, 99 U. S. 727, 25 L. Ed. 504 [1879]) ..... 32

Smallwood v. Gallardo, 275 U. S. 56, 72 L. Ed. 152 (1927) ..... 33

The Baltimore & Potomac Ry. Co. v. Grant, 98 U. S. 398, 25 L. Ed. 231 (1879) ..... 33

PAGE

United States v. Rice, 327 U. S. 742, 90 L. Ed. 982 (1946) ..... 34
United States Mortgage Co. v. Mathews, 293 U. S. 232, 79 L. Ed. 299 (1934) ..... 32
Veix v. Sixth Ward Bldg. & Loan Assoc., 310 U. S. 32, 84 L. Ed. 1061 (1940) ..... 22
Watson v. Employers Liability Assur. Corp., 348 U. S. 66, 99 L. Ed. 74 (1954) ..... 10
White v. United States, 270 U. S. 175, 70 L. Ed. 530 (1926) ..... 32

STATUTES

California Civil Code, Sec. 2889 ..... 28
California Civil Code, Sec. 3005 ..... 29
California Civil Code, Sec. 3011 ..... 5, 6, 10, 25, 28
California Code of Civil Procedure, Sec. 692 ..... 29
California Code of Civil Procedure, Sec. 692a ..... 29
California Code of Civil Procedure, Sec. 693 ..... 29
California Code of Civil Procedure, Sec. 694 ..... 29
California Code of Civil Procedure, Sec. 738 ..... 5, 6, 10, 25
California Code of Civil Procedure, Sec. 739 ..... 5, 6, 7, 11, 25
California Code of Civil Procedure, Sec. 1050 ..... 5, 6, 10, 25
Federal Home Loan Bank Act ..... 11, 30
Home Owners' Loan Act of 1933 ..... 30
Home Owners' Loan Act of 1933, Sec. 5(a) ..... 11
Home Owners' Loan Act of 1933, Sec. 5(d) ..... 11
Housing Act of 1954, Sec. 501 ..... 13, 20, 21, 23
Housing Act of 1954, Sec. 502 ..... 13, 20
Housing Act of 1954, Sec. 503 ..... 13, 20, 21, 23, 35
Housing Act of 1954, Sec. 818 ..... 13, 20
National Housing Act ..... 30
Public Law 560, 83rd Congress, Chap. 649, 2nd Sess., H. R. 7839 ..... 20

PAGE

United States Code, Title 12, Sec. 1422 et seq..... 30
United States Code, Title 12, Sec. 1430..... 12
United States Code, Title 12, Secs. 1462-1464 et seq..... 30
United States Code, Title 12, Sec. 1464(a) ..... 11
United States Code, Title 12, Sec. 1464(d) ..... 11
United States Code, Title 12, Secs. 1724-1725 et seq..... 30
United States Code, Title 28, Sec. 380(a) ..... 4
United States Code, Title 28, Sec. 1254(2).....8, 9, 36, 37
United States Code, Title 28, Sec. 1257(2) ..... 8
United States Code, Title 28, Sec. 1651..... 3
United States Code, Title 28, Sec. 2001..... 29
United States Code, Title 28, Sec. 2004..... 29
United States Code, Title 28, Sec. 2282..... 4
United States Code, Title 28, Sec. 2284..... 4
United States Constitution, Art. I, Sec. 8, Clauses 9, 18..... 33

IN THE

# Supreme Court of the United States

October Term, 1955

No. .....

LONG BEACH FEDERAL SAVINGS AND LOAN ASSOCIATION, TITLE SERVICE COMPANY, HOME INVESTMENT COMPANY,

*Appellants,*

*vs.*

FEDERAL HOME LOAN BANK OF SAN FRANCISCO; W. W. McALLISTER and WILLIAM K. DIVERS, as members of the HOME LOAN BANK BOARD; A. V. AMMANN; GEORGE K. BRAMLEY; and the FEDERAL SAVINGS AND LOAN INSURANCE CORPORATION, a federal corporation,

*Appellees.*

**On Appeal From the United States Court of Appeals for the Ninth Circuit.**

## JURISDICTIONAL STATEMENT.

Appellants appeal from final judgments of the U. S. Court of Appeals for the Ninth Circuit, rendered July 18, 1955.[1]

Such judgments comprise:

(1) An original writ of mandamus against Honorable Peirson M. Hall, Judge, and the U. S. District Court for the Southern District of California, and an original writ of perpetual injunction against appellants and others. Such writs:

> (A) Expose to secret foreclosure, and prevent redemption of $7,000,000[2] of savings deposits, owned by 30,000 mutual Federal Savings depositors in appellant Long Beach Federal Savings and Loan Association.[3]

---

[1]Timely rehearing petitions were denied October 12, 1955. Notices of appeal were filed by appellants on January 5, 1956, with the Clerk of said U. S. Court of Appeals.

[2]All figures are approximate.

[3]Hereafter, Federal Savings Association.

(B) Perpetually enjoin appellants and others from defending said secret foreclosure of, or quieting the titles to, the homes of 8,000 mutual borrower-members of appellant Federal Savings Association against said threatened secret foreclosure.

Such original writs of mandamus and injunction were ordered by said U. S. Court of Appeals in original proceedings, commenced in said Court notwithstanding untried actions pending in the District Court and undecided appeals pending in said Court of Appeals, and involving identical issues.

Appellants submit this statement to show that this Court has jurisdiction of these appeals, and that a substantial question is presented.

## I. OPINIONS BELOW.

The opinion of the U. S. Court of Appeals for the Ninth Circuit in these original mandamus and injunction writs issued by it, is reported at 225 F. 2d at page 349, and was filed in slip opinion form as Appendix B of certiorari petition, October 1955 Term, No. 611.

The opinions of the District Court quieting said homeowners' titles, and protecting said depositors' savings against said secret foreclosure, are reported in 117 F. Supp. 259 and 122 F. Supp. 401, and also at 960.[4] References herein to such opinions are to Appendices A and B and I and II, filed in said No. 611.

## II. FINDINGS BELOW.

The original proceedings were heard by the Court of Appeals solely on petition and returns (with various supplements thereto and exhibits). Every allegation of the petition was denied. No oral testimony was taken. Yet the Court of Appeals, without any trial or reference, has decided untried factual issues in favor of appellees and against appellants. The Court of Appeals has

[4]See appendices and record references at end hereof.

even made 8 findings of fact covering over 4 printed pages (Appx. "B," pp. 67-71) as part of its original perpetual injunction.[5]

## III. GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED.

### A. NATURE OF THE PROCEEDING AND STATUTES PURSUANT TO WHICH IT WAS BROUGHT.

These original mandamus and injunction proceedings were commenced June 4, 1954 by appellees asserting *original* jurisdiction in the U. S. Court of Appeals for the Ninth Circuit, under Title 28 U. S. C. §1651, the "all writs" section.

Appellees claim use of the original jurisdiction of the Court of Appeals to issue extraordinary writs, was required to enforce, as *res judicata*, mandates and judgments of that Court, made in its prior 1952-53 opinions.[6]

All such prior opinions decided only jurisdiction, and not the merits. All were decided upon absence of indispensable parties, failure of the United States to consent to suit, and/or failure to exhaust administrative remedies. Such jurisdictional failures were held in said prior judgments to require dismissal without trial of certain

---

[5]The origin of these 8 findings, as well as the entire original injunction and mandamus, remain shrouded in mystery. During oral argument, but before appellants had been heard, the Court of Appeals requested submission by counsel of the forms of writs, injunctions, judgments, etc., sought. Counsel for appellants were not permitted access to such findings, injunctions, mandamus, etc., so submitted to the Court of Appeals by counsel for appellees. Requests for service of copies thereof were refused. Appellants' designation of such proposed findings, injunctions, mandamus, etc., as part of the record on appeal, was ignored and they are yet omitted therefrom. Whether the "findings", injunctions and mandamus originated with appellees, or with the Court of Appeals, is therefore unknown.

[6]*Home Loan Bank Board v. Mallonee*, 196 F. 2d 336; *Fahey v. O'Melveny & Myers*, 200 F. 2d 420; and *Fahey v. Calverley*, 208 F. 2d 197.

pleadings, and *one only* of the *two* actions then pending in the District Court.[7]

A new and separate foreclosure action (13979) was commenced by appellee San Francisco Bank against appellant Association in 1952, *6 years after* appellants'

---

[7]The actions in the District Court from which the appeals in 196 F. 2d 336, 200 F. 2d 420, and 208 F. 2d 197, were taken, were Nos. 5421 and 5678 in said District Court. No. 5421 was first heard by a special three-judge court, convened as required by then Title 28 U. S. C. §380(a), now §§2282, 2284.

Hearings before such three-judge court resulted in *Mallonee v. Fahey*, 68 F. Supp. 418, which on appeal was decided in *Fahey v. Mallonee*, 332 U. S. 245, and *Ex Parte Fahey*, 332 U. S. 258.

Upon remand from this Court to said District Court, actions 5421 and 5678 were consolidated, and thereafter numerous final judgments, disposing of portions, but not all, of the controversy, were made by said District Court. In January 1948, the conservator, whose status is discussed in *Fahey v. Mallonee*, 332 U. S. 258, was removed by Home Loan Bank Board Order No. 388, which, by its terms, required filing of a copy with said U. S. District Court. Thereafter all administrative proceedings for removal of said conservator were moot.

Appellees' Order No. 388 removing the appellee conservator, required the conservator to account with the U. S. Court in action 5421, *et al.*, for $26,000,000 of appellants' seized and uncounted cash, U. S. bearer bonds, and negotiable securities. When appellees seized such assets they refused to give any receipts or to permit any independent count or audit to be made. Appellee conservator's first attempt to account was rejected by the U. S. Court. His second attempt to account is pending, subject to multi-million dollar objections thereto.

In 1949, appellees scheduled an administrative hearing before themselves. The order to show cause setting said administrative hearing required appellant Federal Savings Association to show cause why appellee Federal Savings and Loan Insurance Corporation should not be appointed receiver for appellant Federal Savings Association. Appointment of such receiver was only for the purpose of liquidation.

Appellant Federal Savings Association was solvent, prosperous and growing. No cause for its liquidation existed. Such receivership and liquidation would have enabled appellees to control and dispose of the litigation against themselves, and escape liability to account, all without court trial or hearing.

The District Court enjoined appellees' administrative hearing as, among other things, an interference with the jurisdiction of the Court. Appeals from such injunction resulted in *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336.

1946 actions. No appeals taken in foreclosure action 13979 have yet been heard by the Court of Appeals, *nor have they ever been before this Court.*

Foreclosure action 13979 seeks, among other things, court foreclosure, declaratory relief, and other enforcement against appellants, of a denied $7,000,000 debt, created by appellee Ammann (as conservator for petitioner Federal Savings Association) in favor of appellee San Francisco Bank.

Appellants deny all liability for said debt, and allege that it was created in violation of applicable law; that there was no consideration; that all claimed liens or other security have been discharged by tender; and that statutes of limitations have expired.

The original writs of mandamus and injunction issued by the Court of Appeals:

(a) compel delivery for secret foreclosure, prior to trial and without redemption, of appellants $7,000,000, the *res* of said foreclosure action 13979;

(b) strike without hearing or trial appellants' defensive cross-claims and other pleadings therein;

(c) vacate without hearing quiet title judgments in favor of appellants' 8,000 homeowners, against appellees' threatened foreclosure of said homes.

**B. THE COURT OF APPEALS INVALIDATED CALIFORNIA STATE STATUTES AS REPUGNANT TO THE LAWS OF THE UNITED STATES.**

Appellants relied upon California State foreclosure and quiet title statutes for their defenses against foreclosure, in appellees' own foreclosure action (13979) in the District Court.[8]

When appellees commenced these original mandamus and injunction proceedings in the Court of Appeals, to

---

[8]California State statutes relied upon were, as to foreclosure, §3011 of the California Civil Code; as to quiet title, §§738-739 and 1050 of the California Code of Civil Procedure. (See pages 10-11 hereof for text.)

decide their own foreclosure action (13979) without trial, appellants again relied upon the same California State statutes.[9]

The same California State foreclosure statutes and procedures were invoked by appellee San Francisco Bank itself, when it as plaintiff filed its own foreclosure action (13979) in the California State Courts. Each of the conservator's notes it sought, as plaintiff, to foreclose contain a provision:

> ". . . This note shall be construed according to the laws of the state in which the principal office of the payee is situated." (Appx. I, p. 136.)

Payee San Francisco Bank's principal office is at San Francisco, in California.

By its own foreclosure complaint said Bank prayed:

> "For judgment foreclosing its aforesaid lien in the manner as provided by law;"

*Filed in California State Courts, such prayer was for judgment "foreclosing" its aforesaid lien in the manner as provided by California law.*

---

[9]At page 19 of the "Return and Answer to Petition For Writ of Mandamus, etc . . .", appellants cited and quoted California Civil Code, sec. 3011, which governs the rights of a pledgee in California who seeks judicial foreclosure sale. At pages 17 to 24 incl. of the Petition for Rehearing by the real parties in interest, appellants repeatedly cited the California State statutes (*California Civil Code*, Sec. 3011 on foreclosure, and *California Code of Civil Procedure*, Secs. 738-739 and 1050 on quiet title), relied on by them, and invalidated by the Court of Appeals.

Respondent District Court likewise relied upon the California State statutes invalidated by the Court of Appeals decision. In 122 F. Supp. 401, at 422-424, respondent District Court cited said California quiet title statutes, and based its quiet title judgments thereon.

At 117 F. Supp. 259, at 290, respondent District Court cited and relied upon California State foreclosure statutes, including Sec. 3011 of the *Civil Code of California*.

An order retaining appellants' $7,000,000 of U. S. bearer bonds and cash in the registry of the District Court, pending trial of appellees' foreclosure action, was made by respondent District Court in reliance upon the California statutes cited in its opinions above.

The same California State quiet title statutes[10] and procedures were invoked by appellee San Francisco Bank itself, when it, anxious to escape assessment of costs against it, recorded its disclaimer in favor of 8,000 appellant homeowners, in the Los Angeles County, California State Recorder's Office, and thereafter filed such disclaimer in Court in its own foreclosure action 13979.[11]

The Court of Appeals' original writs of mandamus and injunction invalidate said California State foreclosure and quiet title statutes, but without expressly naming them.

The quiet title judgments, and orders preventing secret foreclosure, made by respondent District Court, can be nullified only by invalidating the State statutes upon which they were based.

### C. FAILURE OF THE COURT OF APPEALS TO EXPRESSLY MENTION THE CALIFORNIA STATE STATUTES WHICH IT INVALIDATED, DOES NOT NULLIFY THE JURISDICTION OF THIS COURT.

It is beyond question that the Court of Appeals herein did in fact invalidate California State foreclosure statutes and California State quiet title statutes. While the Court below did not expressly mention these State statutes, which it has invalidated, it is clearly established by the decisions of this Court that such mention is totally unnecessary to vest jurisdiction in this Court where the decisions below clearly invalidate California State statutes.

---

[10]California Code of Civil Procedure, §739:

"[*When plaintiff cannot recover costs.*] If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. [Enacted 1872.]"

[11]Foreclosure action 13979 was originally filed by appellee Bank, as plaintiff, in California State Courts. It was removed by defendant Federal Savings Association from California State to U. S. District Court, wherein it is 13979. Remand from Federal to State Court has been denied by the District Court.

Appeal to this Court under Title 28 U. S. C. §1254(2):

> ". . . by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the . . . laws of the United States, . . ."

cannot be prevented by the Court below failing to put its ruling in direct terms. If the State statute was relied upon before the Court below, and the ruling is against the validity of the State statute, the right of appeal exists regardless of the court's failure to mention the State statutes invalidated.

This Court has repeatedly ruled that such decisions are reviewable by direct appeal, and that the lower courts cannot evade this Court's jurisdiction by failing to expressly mention the statutes or rights thus invalidated.

State Supreme Courts have often invalidated laws of the United States as repugnant to State statutes, without naming or mentioning the United States laws so invalidated. Under the predecessors of Title 28 U. S. C. §1257(2), this Court has heard appeals from such decisions, notwithstanding no mention was made in the lower court opinions of any law of the United States, nor was any basis for this Court's jurisdiction apparent from the lower court opinions.

In *Norris v. Alabama*, 294 U. S. 587, 590, this Court said:

> ". . . When a federal right has been specially set up and claimed in a state court, it is our province to inquire not merely whether it was denied in express terms but also whether it was denied in substance and effect. . . ."

In *Ferris v. Frohman*, 223 U. S. 424, 431, this Court said:

> ". . . The fact that the court reached its conclusion . . . on common-law principles, . . . does not alter the effect of the decision. By the decree Ferris was permanently enjoined . . . The decision thus denied to him a Federal right specially set

up and claimed, . . . This court therefore, has jurisdiction . . . [citations]"

In our case appellant homeowners and savings depositors are "perpetually" enjoined by the Court of Appeals from defending against foreclosure, or obtaining quiet title judgments, in any court, State or Federal. By such perpetual injunction, both said California State statutes and appellants' defenses based thereon, are invalidated as repugnant to laws of the United States.

In *Schlemmer v. Buffalo, R. & P. R. Co.,* 205 U. S. 1, 11, this Court said:

> ". . . if the question is duly raised and the judgment necessarily, or, by what appears, in fact involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it . . ."

In *N. Y. Ex Rel. Bryant v. Zimmerman,* 278 U. S. 63, 67, this Court said:

> ". . . it is not necessary that the ruling shall have been put in direct terms. If the necessary effect of the judgment has been to deny the claim, that is enough. [citing authorities.]"

**D. STATUTORY PROVISIONS WHICH CONFER JURISDICTION OF THIS APPEAL ON THIS COURT.**

Appellants relied upon California State foreclosure and quiet title statutes[12] for their defenses against appellees' secret foreclosure. The Court of Appeals invalidated such State statutes as repugnant to the laws of the United States.

Jurisdiction of this Court to review by appeal, judgments enforcing such original writs of mandamus and injunction is conferred by Title 28 U. S. C. §1254(2).

The following decisions sustain the jurisdiction of this Court to review such judgments: *Ott v. Mississippi*

---

[12]See pages 10-11 hereof, "Statutes Involved" for text of California Statutes.

*Valley Barge Line Co.*, 336 U. S. 169, 172; *Watson v. Employers Liability Assur. Corp.*, 348 U. S. 66, 70; *McCarroll v. Dixie Greyhound Lines, Inc.*, 309 U. S. 176.

## IV. STATUTES INVOLVED.

By its original writs of mandamus and injunction, the Court of Appeals has invalidated, as repugnant to repealed laws of the United States, California State statutes preventing secret foreclosure of savings deposits and homes, and entitling California homeowners-borrowers to quiet their titles against such threatened foreclosure. Such California statutes are:

### (a) Text of California Foreclosure Statute Which Was Invalidated.

California Civil Code, §3011 reads in part:

> "§3011. [*Pledgee may foreclose right of redemption.*] *Instead* of selling property pledged, as hereinbefore provided, a pledgee *may foreclose* the right of redemption *by a judicial sale*, under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale." (Emphasis added.)

### (b) Text of California Quiet Title Statutes Which Were Invalidated.

California Code of Civil Procedure, §738, reads in part:

> "§738. [*Action to quiet title to real and personal property.*] An action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim . . ."

California Code of Civil Procedure, §1050 reads in part:

> "§1050. [*Actions to determine adverse claims, and by sureties.*] An action may be brought by one person against another for the purpose of determining an adverse claim, which the latter makes against the former for money or property upon an alleged obligation; . . ."

California Code of Civil Procedure, §739 reads:

"§739. [*When plaintiff cannot recover costs.*] If the defendant in such action disclaim in his answer any interest or estate in the property, or suffer judgment to be taken against him without answer, the plaintiff cannot recover costs. [Enacted 1872.]"

**(c) Text of Repealed Acts of Congress Which Were Held to Invalidate Existing California State Statutes, Even After Repeal.**

The repealed and amended acts of Congress enforced by the Court of Appeals by mandamus and injunction *after* their repeal are:

(1) Home Owners' Loan Act of 1933, Sec. 5(a) and (d), Title 12 U. S. C. §1464(a) and (d), which *before amendment* read:

"Sec. 5(a) In order to provide local mutual thrift institutions in which people may invest their funds and in order to provide for the financing of homes, the Board is authorized, under such rules and regulations as it may prescribe, to provide for the organization, incorporation, examination, operation, and regulation of associations to be known as 'Federal Savings and Loan Associations,' and to issue charters therefor, giving primary consideration to the best practices of local mutual thrift and home-financing institutions in the United States."

(2) Section 5(d):

"(d) The Board shall have full power to provide in the rules and regulations herein authorized for the reorganization, consolidation, merger, or liquidation of such associations, including the power to appoint a conservator or a receiver to take charge of the affairs of any such association, and to require an equitable readjustment of the capital structure of the same; and to release any such association from such control and permit its further operation."

(3) Federal Home Loan Bank Act, Title 12 U. S. C. §1430, which *before amendment* read in part:

"§1430. *Advances—Authorization to make; limitation on amount*

"(a) Each Federal Home Loan Bank is authorized to make advances to its members upon the security of home mortgages, or obligations of the United States, or obligations fully guaranteed by the United States, subject to such regulations, restrictions, and limitations as the Board may prescribe.

. . .

"

. . .

*"Notes of borrowing members; interest rate; limitation on loans; lien on stock*

"(c) Such advances shall be made upon the note or obligation of the member or nonmember borrower secured as provided in this section, bearing such rate of interest as the board may approve or determine, and the Federal Home Loan Bank shall have a lien upon and shall hold the stock of such member as further collateral security for all indebtedness of the member to the Federal Home Loan Bank . . .

*"Obligation to repay; additional security; sale of advances to other banks*

"(d) The institution applying for an advance shall enter into a primary and unconditional obligation to pay off all advances, together with interest and any unpaid costs and expenses in connection therewith according to the terms under which they were made, in such form as shall meet the requirements of the bank and the approval of the board. The bank shall reserve the right to require at any time, when deemed necessary for its protection, deposits of additional collateral security or substitutions of security by the borrowing institution, and each borrowing institution shall assign additional or substituted security when and as so required. . . ."

**(d) Housing Act of 1954 Removed All Conflicts Between California State Statutes and Acts of Congress.**

The *new* Housing Act of 1954 by its terms repealed and amended all prior inconsistent law. Yet the Court of Appeals refused in 1955 to apply or follow it. Such Act reads in part:

*"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the 'Housing Act of 1954.'"

* * * * * * * *

"ACT CONTROLLING

"Sec. 818. Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

* * * * * * * *

"TITLE V—HOME LOAN BANK BOARD

"Sec. 501. The National Housing Act, as amended, is hereby amended—"

* * * * * * * *

"Sec. 502. The Federal Home Loan Bank Act, as amended, is hereby amended . . .

"Sec. 503. The Home Owners' Loan Act of 1933, as amended, is hereby amended—

". . .

"(2) by amendment subsection (d) of section 5 to read as follows:

". . . The Board shall have power to sue and be sued, complain and defend in any court of competent jurisdiction in the United States or its territories or possessions or the Commonwealth of Puerto Rico. . . . the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. The Board may apply to the United States district court of the district where the association affected has its home office for the enforcement of any order of the Board and such court shall have power to enforce any such order which has become final. The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other

law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia."[13]

## V. QUESTIONS PRESENTED.

1. Whether California State statutes,

(a) preventing appellees' secret foreclosure, without redemption, of $7,000,000[14] of savings deposits of appellant's 30,000 mutual savings depositors, and

(b) protecting, by quiet title judgments, 8,000 homeowner borrowers of appellant Federal Savings Association,

against a $7,000,000 foreclosure by appellee Federal Home Loan Bank, may be invalidated as repugnant to Acts of Congress which said Congressional Acts were repealed prior to the decisions of invalidation.

2. Whether a U. S. Court of Appeals can substitute its original writs of mandamus and injunction for pending untried actions and undecided appeals, and thereby invalidate California State statutes requiring Court adjudication of the amount and validity, if any, of the denied $7,000,000 debt appellees threaten to secretly foreclose against 30,000 Federal Savings depositors and 8,000 Federal homeowners-borrowers, prior to trial and without redemption.

3. Whether the Housing Act of 1954, passed by Congress under powers to amend and repeal, expressly reserved in:

(a) The terms of notes for $7,000,000, sought to be foreclosed in yet pending litigation; and

---

[13]For full text of amendments see Appx. A to October Term 1955 No. 611, pp. 9-34.

[14]All figures are approximate.

(b) In corporate charters of appellant Federal Savings Association and appellee Federal Home Loan Bank;

applies to pending, untried litigation, and existing causes of action, between said appellants, appellees and others, so as to remove any possible prior conflict between California State statutes and Acts of Congress, *as amended* by said U. S. Housing Act of 1954, or is "purely *prospective*" (Appx. B, p. 40), as is held by the Court of Appeals.

4. Whether the Court of Appeals can *now* turn its prior decisions, based wholly on lack of jurisdiction, into *res judicata* of untried merits, and thereby invalidate California State foreclosure and quiet title statutes.

## VI. STATEMENT.

### A. CALIFORNIA STATE STATUTES PROTECTING 38,000 HOMEOWNERS AND SAVINGS DEPOSITORS AGAINST SECRET FORECLOSURE ARE INVALIDATED AND HOMEOWNERS ARE THREATENED WITH FORECLOSURE OF TRUST DEEDS WHICH HAVE BEEN FULLY PAID.[15]

#### (1) Creation of $7,000,000 Denied Debt on Which Homeowners Are Threatened With Foreclosure.

In May 1946, appellee Ammann was appointed conservator for appellant Federal Savings Association. He purported to borrow $7,000,000[16] from appellee Federal Home Loan Bank of San Francisco. Among other security for such loan, he assigned, endorsed and delivered to said San Francisco Bank 4,236 notes, secured by trust deeds on the homes of approximately 8,000 homeowner borrowers from appellant Association.[17] The total amount originally loaned on said homeowners' notes, and

---

[15]As of January 18, 1954, there were 4,236 homeowners' notes, of which 3,043 had been fully paid and 1,193 had been greatly reduced by partial payments, but were not yet fully paid off.

[16]All figures are approximate. The principal was $6,300,000; alleged accrued interest $700,000; the present total $7,000,000.

[17]Two borrowers for each home, usually husband and wife.

secured by the trust deeds on their homes, was $16,967,-606.46 (See Appx. II, pp. 259-379, for 110 page schedule of names of homeowners, recording data, amount of loan, etc.). Each of said 4,236 homeowners' notes was endorsed:

"PAY TO THE ORDER OF THE FEDERAL HOME
LOAN BANK OF SAN FRANCISCO
LONG BEACH FEDERAL SAVINGS AND
LOAN ASSOCIATION
BY A. V. AMMANN
CONSERVATOR"

After such endorsement such notes were delivered to appellee San Francisco Bank. Separate written assignments of said homeowners' trust deeds were also made and delivered by appellee Ammann to said San Francisco Bank.

**(2) Homeowners Pay Loans in Full Into U. S. Court.**

In 1946-48, homeowners of approximately 480 separate loans, intervened in the 1946 litigation (Actions 5421 and 5678), and paid off the total amounts due on their respective homes. Such payments were made into the registry of the District Court. Such payments into Court exceeded $1,641,040.46.

On January 24, 1948, appellee Ammann was removed as conservator by order of appellee Bank Board, made without any administrative hearing, and by final judgment of the District Court based thereon. He returned part, *but not all,* of the seized assets of appellant Savings Association. He returned *none* of the seized 4,236 homeowners' notes and trust deeds which he had assigned and delivered to appellee San Francisco Bank.

**(3) Foreclosure Threatened, Despite Tender of Full Payment Twice Made and Rejected.**

Appellant Association has twice tendered *payment in full* of the $7,000,000 alleged debt.

Such tenders were by cashiers' checks and cash to be deposited in court, until *court* decision of the amount, *if*

*any*, due on the denied $7,000,000 debt. The first tender of over $6,300,000 was made in March 1948 (before accrual of the claimed $700,000 of interest) in the actions filed by appellants.[18]

The second tender of $7,000,000 was made in December 1953 in appellees' own foreclosure action, filed by one of them as plaintiff, claiming court foreclosure *after* court declaration of the amount, *if any*, due on said denied $7,000,000 debt.[19]

Both tenders were rejected by appellees.

**(4) Homeowners Directed by Court to Pay Their Loans to Appellant Association.**

In March 1948, after appellee San Francisco Bank rejected tender of payment of $6,300,000 in full, the District Court ordered return into the registry of said court of all homeowners' notes and trust deeds, assigned by appellee Ammann to appellee San Francisco Bank.

Said Bank complied with this Court order and so delivered said homeowners' 4235 notes and trust deeds into the registry.

Thereafter the Court cancelled all said endorsements and assignments of said homeowners' 4236 notes and trust deeds, and directed delivery thereof from the registry of the Court to appellant Association. The Court further directed the homeowners to make all future payments to appellant Association.

$7,000,000 of appellant Association's United States Government bonds and cash remained in court to fully secure appellees.

*No appeal was ever taken from any of said Court orders.*

---

[18]For résumé of action 5421, commenced by a depositors' protective committee of appellant Savings Association, in 1946, see footnote 7.

[19]See pp. 5 and 18 hereof, for résumé of appellees' foreclosure action 13979.

**(5) Appellees Ask Court to Foreclose on Homeowners' Notes and Trust Deeds, Which Are Fully Paid and Discharged.**

In March 1952, 4 years after surrendering possession of the homeowners' 4,236 notes and trust deeds, and after court cancellation of all assignments or endorsements thereof, appellee San Francisco Bank yet filed its court foreclosure action to foreclose its claimed liens thereon!

Its foreclosure complaint alleged:

> "That said defendant assigned, delivered and pledged to plaintiff . . . promissory notes secured by mortgages or deeds of trust on real property . . . as security for the repayment of said sums advanced and loaned to said defendant by said plaintiff . . . That by reason of said assignments and pledges said plaintiff became, ever since has been and still is the owner and holder of a lien upon all said pledged and assigned property."

The complaint prays judgment, (p. 12, line 11):

> "For judgment foreclosing its aforesaid liens in the manner as provided by law; . . ."

(Appx. II, pp. 217-218.)

**(6) Disclaimer and Quit Claim of Appellees San Francisco Bank, et al., in Favor of Homeowners, Repudiated.**

On January 18, 1954 appellee San Francisco Bank filed in its own foreclosure action 13979, a disclaimer[20] which it had previously caused to be recorded.

Such disclaimer was in favor of all 8,000 homeowners.

Under California law, such disclaimer required a quiet title judgment in favor of each homeowner, and against appellees San Francisco Bank, *et al.*, as a matter of absolute right.[21]

But when the homeowners sought to enforce this disclaimer, appellees repudiated it.

---

[20]Appx. I, p. 25; also Appx. II, p. 222.

[21]See pages 10-11 hereof for text of California Code sections, and footnote 35 for California Supreme Court citations.

Appellees resisted entry of quiet title judgments in the District Court based on their own disclaimer, filed by themselves in their own foreclosure action 13979. And when such quiet title judgments were yet entered over their objections, appellees appealed therefrom.

**B. 30,000 SAVINGS DEPOSITORS ARE THREATENED WITH SECRET FORECLOSURE, DESPITE TENDER OF PAYMENT IN FULL.**

**(7) Terms of Denied Debt Permit Secret Foreclosure.**

The denied $7,000,000 debt is evidenced by 4 separate Conservator's notes. Each of the 4 alleged notes purport to authorize appellees to secretly foreclose appellants' savings, without notice, at an unknown time and place of sale, and without any right of redemption. Thereby appellees would be the only bidders at their own secret foreclosure sale, from which they had excluded appellants and all independent bidders. The purported notes read in part:

> ". . . payee may, . . . sell . . . the whole . . . collateral security, without any relief to the maker from any valuation or appraisement laws . . . at any public or private sale, without demand, advertisement or notice of the time or place of sale or of adjournments thereof, all of which are hereby expressly waived. The maker further waives any and all equity or right of redemption, whether before or after sale hereunder, and agrees that upon such sale the payee may become the purchaser . . . free from any such right or equity of redemption . . ."[22]

**(8) Appellees Obtained Original Writs of Mandamus and Injunction From Court of Appeals, to Nullify Homeowners' Quiet Title Judgments and Defenses Against Foreclosure.**

In June 1954, appellees commenced these original proceedings in the Court of Appeals to obtain original

[22]See Appx. I, pp. 133 to 136 for text of notes.

writs of mandamus against U. S. District Judge Peirson M. Hall, who had quieted the homeowners' titles against foreclosure.

Appellees also asked an original injunction against appellants homeowners, savings depositors, etc., defending against foreclosure of their savings and homes.

**(9) Congress Acts to Save Homeowners and Savings Depositors From Foreclosure.**

While appellees' petitions for original writs of mandamus and injunction against appellant homeowners and savings depositors were pending, as yet unheard, before the Court of Appeals, Congress enacted sections 501-2-3 of the Housing Act of 1954.[23]

This remedial and curative legislation was the result of *two* Congressional investigations of this very litigation, and appellees' repeated clouding of appellants homeowners' titles.[24]

Congress repealed and swept aside every law under which appellant homeowners or savings depositors could be foreclosed without trial. The new Housing Act of 1954 reads in part:

"ACT CONTROLLING.

"SEC. 818. Insofar as the provisions of any other law are inconsistent with the provisions of this Act, the provisions of this Act shall be controlling."

---

[23]Public Law 560, 83rd Congress, Chap. 649, 2d Session, H. R. 7839. See Appx. A, pp. 9 to 17.

[24]"Hearings Before The Special Committee To Investigate Executive Agencies, House of Representatives, Seventy-Ninth Congress, Second Session, Pursuant to H. Res. 88, Part 7, Complaints of Federal Home Loan Bank of Los Angeles and Federal Savings and Loan Association of Long Beach Against The Federal Home Loan Bank Administration." "Hearings Before A Special Subcommittee Of The Committee On Expendtures In The Executive Departments, House of Representatives, Eighty-First Congress, Second Session, and Eighty-Second Congress, First and Second Sessions, Investigation Of The Home Loan Bank Board."

Prior decisions of the Court of Appeals[25] had dismissed the homeowners' 1946 pleadings for lack of jurisdiction over appellee Bank Board, and failure to then (in 1946) exhaust administrative remedies.

By the Housing Act of 1954, Congress repealed and amended every law upon which said prior decisions were based, and in lieu thereof enacted Sec. 503 of the Housing Act of 1954, which reads in part:

"TITLE V—HOME LOAN BANK BOARD."

". . . The Board shall be subject to suit by any Federal savings and loan association with respect to any matter under this section or regulations made thereunder, or any other law or regulation, in the United States district court for the district where the home office of such association is located, and may be served by serving a copy of process on any of its agents and mailing a copy of such process by registered mail, to the Home Loan Bank Board, Washington, District of Columbia."

Section 501 of the Housing Act of 1954, rendered appellee Federal Savings and Loan Insurance Corporation similarly subject to both jurisdiction and venue of the District Court in this very litigation.[26]

Further Section 503 reads in part:

". . . the association affected may, within thirty days after the service of said notice, apply to the United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders . . ."

---

[25]*Home Loan Bank Board v. Mallonee*, 196 F. 2d 336; *Fahey v. O'Melveny & Myers*, 200 F. 2d 420; and *Fahey v. Calverley*, 208 F. 2d 197.

[26]See Appx. A, p. 9 for text of Sec. 501 of the Housing Act of 1954.

**(10) Congressional Power to Save Homeowners and Savings Depositors From Foreclosure Was Expressly Reserved in Notes to Be Foreclosed and Corporate Charter of Appellee Bank and Appellant Savings Association.**

The remedial, curative and procedural amendments contained in the Housing Act of 1954 were enacted by Congress in its exercise of an express reserved legislative power to so amend. Power to amend to save homeowners from foreclosure was reserved in the express terms of each of the conservator's notes[27] for $7,000,000, sought to be foreclosed, and in the charters of appellee San Francisco Bank,[28] and appellant Federal Savings Association.[29]

Such power to amend also exists without any reservation, as part of the sovereign power of Congress.[30]

---

[27]Each of the four alleged conservator's notes (totaling $7,000,000) contains a provision reading:

> "The rights, powers, and privileges conferred upon the Federal Home Loan Bank Board and/or member banks by the 'Federal Home Loan Bank Act,' approved July 22, 1932, as in force at the date of the execution hereof *and/or as hereafter amended*, are hereby made a part of the provisions of this note . . ." (Emphasis added.) (Appx. I, p. 136.)

[28]The charter of Federal Home Loan Bank of San Francisco reads in part:

> "6. This Certificate is made for the purpose of carrying out the provisions of the Act of Congress, known and cited as the Federal Home Loan Bank Act, approved July 22, 1932, *and such other acts as may be passed by Congress amending or supplementing* the said Federal Home Loan Bank Act, in so far as it or they may be applicable to the Federal Home Loan Bank . . ." (Emphasis added.)

[29]The charter of appellant Long Beach Association, Sec. 3, Objects and powers, reads in part:

> ". . . The Association shall have such powers . . . in conformity with the Home Owners' Loan Act of 1933 and all laws of the United States as they now are, *or as they may hereafter be amended* . . ." (Emphasis added.)

[30]*Gelfert v. National City Bank*, 313 U. S. 221; *Home Bldg. & L. Assoc. v. Blaisdell*, 290 U. S. 398, 435; *Veix v. Sixth Ward Bldg. & Loan Assoc. of Newark*, 310 U. S. 32.

**(11) Appellees Asked, and Congress Refused, to Permit Homeowners and Savings Depositors to Be Enjoined From Defending Against Foreclosure.**

Appellees asked Congress to exempt their original mandamus and injunction proceedings in the Court of Appeals (and all of this pending litigation) from the effect of the Housing Act of 1954.

Congress expressly refused to do so. During the progress of this legislation through Congress, the Senate granted such exemption, but the House rejected it.

A letter[31] was written by B. T. Fitzpatrick, General Counsel for the Housing and Home Finance Agency, to the Senate Committee on Banking and Currency, on June 17, 1954. This letter reads in part:

> "There is but one pending suit to which the provision would be applicable, *i. e.,* the California litigation. . . . The Court of Appeals for the Ninth Circuit has issued an order to the District Court and the litigants to show cause why that litigation should not be permanently enjoined . . ."

After receipt of this letter, the House and Senate Joint Conference Committee rejected the amendments, the Senate receded and both House and Senate repassed the Housing Act of 1954, *with the Senate amendments deleted.*[32]

---

[31]See Appx. A, p. 1 for copy of letter.

[32]During the enactment of the Housing Act of 1954, at the urging of counsel for the appellees' parent, the Housing and Home Finance Agency, the Senate enacted, and later withdrew, amendments. To Section 501, the Senate added the language:

> "'. . . Provided, that the provisions hereof relating to service of process shall not be applicable to any pending court action or suit or to any action or suit involving the subject matter or part thereof, of such pending action or suit.'";

To Section 503, the Senate added the language:

> "'. . . Nothing in this subsection relating to jurisdiction, venue, service of process or suability of the Board shall be applicable to any pending court action, or suit, or to any action, or suit involving the subject matter or part thereof, of such pending action or suit.' . . ." (100 Cong. Rec. 6886-6887.)

**(12) The Court of Appeals Enjoins Appellant Homeowners and Savings Depositors From Defending Against Foreclosure, Despite Congressional Repeal of Authority so to Do.**

The Housing Act became effective August 2, 1954. Quiet title judgments of the District Court in favor of appellant homeowners and against appellees' foreclosure, were entered September 16, 1954.

The original writ proceedings before the Court of Appeals were argued February 28, 1955, and decided July 18, 1955, *after* the Housing Act of 1954.

Yet in the teeth of Congressional refusal to exempt this pending litigation from the Housing Act of 1954, the Court of Appeals has nullified such Congressional amendments and said, (Op. p. 40, Appx. B):

> ". . . the language in question should and must be regarded as purely *prospective* in its application . . ."

Thereby the Court of Appeals has enacted and enforced by mandamus and injunction, the very law that both House and Senate rejected and refused to pass.

## VII. THE QUESTIONS ARE SUBSTANTIAL.

### A. $7,000,000 FORECLOSURE YET THREATENED, AFTER PAYMENT IN FULL, IS A SUBSTANTIAL QUESTION.

Appellants 8,000 homeowners have paid over $6,641,040.46 as payment in full, on the respective loans on their homes. Such payments were either directly into the registry of the court; or to appellant Federal Savings Association, as ordered by the court.

Such payments were made in reliance upon U. S. court judgments which are final. The judgments became final by 1947-48 appeals taken or dismissed, or from failure to take any appeal whatsoever.

Despite such payments in full, 5 years later, in 1952, appellants were again threatened by appellee San Francisco Bank with a $7,000,000 court foreclosure upon the

very notes and trust deeds which the homeowners had previously paid in full.[33]

In 1953, appellees made a formal written disclaimer,[34] for the benefit of all 8,000 homeowners. The disclaimer was recorded in the Los Angeles County Recorder's Office, and in 1954 filed in appellees' own foreclosure action 13979.

Yet, despite payment in full, and in direct violation of such disclaimer, appellant homeowners are yet denied a clear title to their respective homes.

The 1954 quiet title judgments, based upon payment in full and formal disclaimer, are nullified by original mandamus and injunction of the Court of Appeals. The Court of Appeals not only refuses to permit any quiet title judgment to stand, it also enjoins appellants from obtaining such a judgment "in any other suit or action now pending . . . or in any other court." (Op. p. 71, Appx. B.)

Under California State statutes, the right to a quiet title judgment is absolute. Appellants are not compelled to remain forever threatened with foreclosure of loans fully paid 10 or more years ago.[35]

Such threats constitute a cloud upon appellant homeowners' title.

---

[33]See p. 18 hereof for part of text of foreclosure complaint.

[34]Appx. I. p. 25; also Appx. II, p. 222.

[35]Judge Peirson M. Hall, of the District Court, cited and made a basis of his decision, the California State foreclosure and quiet title statutes. At 122 F. Supp. 401, at 422-424, and at 117 F. Supp. 259 at 290, Judge Hall cited, quoted, and relied upon, California Code of Civil Procedure, §§738-739 and 1050, and California Civil Code, §3011 and *Bulwer Consolidated Mining Co. v. Standard Mining Co.*, 83 Cal. 589.

Judge Hall is from the California Bar. Therefore this Court gives special weight to his statement of what California law is.

*Bernhardt v. Polygraphic Company*, October Term, 1955, No. 49, Decided January 16, 1956 (100 L. Ed. Adv. No. 6, 203, 208):

> ". . . Since the federal judge making those findings is from the Vermont bar, we give special weight to his statement of what the Vermont law is . . ."

In the 10 years since 1946, appellee San Francisco Bank has repeatedly switched positions on foreclosure of these homeowners. In 1948, appellee Bank delivered all 4,236 notes and trust deeds of appellant homeowners into the registry of the U. S. Court, and suffered quiet title judgments to be entered against it. No appeal was ever taken, and such judgments became final.

Yet, 4 years later in 1952, its $7,000,000 foreclosure complaint was filed against these very same 4,236 notes and trust deeds, including those fully paid off.

A year later, in 1953, appellee Bank made and recorded its written disclaimer in favor of all 8,000 borrower appellants. In 1954, the disclaimer was filed in appellee Bank's own foreclosure action, 13979, commenced by it as plaintiff.

Surely the very court appellees asked to foreclose, should have jurisdiction to quiet the homeowners' titles against that foreclosure, after appellees' disclaimer filed therein.

Yet in 1955, appellees have repudiated their disclaimer and the Court of Appeals has nullified the quiet title judgments in favor of 8000 appellant homeowners based thereon.

As the record now stands appellant homeowners have paid over $6,641,040.46 in full payment of the loans on their respective homes, but cannot clear their titles by any quiet title (or other) judgment of any court.

Appellees' foreclosure complaint in 13979 remains pending unamended, and yet prays:

> "For judgment foreclosing its aforesaid lien in the manner as provided by law;"

upon the very 4,236 notes and trust deeds fully paid and disclaimed.

The Court of Appeals, at Appx. "B", pp. 41-46, under the heading "The Disclaimer Issue", discusses the quiet title judgments which it nullifies by original mandamus, and says at page 46:

> ". . . if any court was hereafter confronted

with this record it would be more than justified in bluntly refusing to entertain, or tolerate, a suit by that Bank in which it sought, directly or indirectly, to assert any claim against or interest in the said real property of these individual 'home owners' if the claim arose out of the transactions here referred to and which were discussed in our Mallonee opinion. So much for the 'disclaimer.'"

Yet, in the same opinion, the Court of Appeals, by original mandamus and injunction, vacates and nullifies the very quiet title judgments which *now* protect appellant 8,000 homeowners against "any court hereafter" being required to consider future protection for appellant homeowners.

Thereby appellant homeowners are left at the mercy of appellee Bank.

**B. SECRET FORECLOSURE PRIOR TO TRIAL AND WITHOUT REDEMPTION, VIOLATES PUBLIC POLICY, AND IS A SUBSTANTIAL QUESTION.**

Public notice of the time and place of a threatened $7,000,000 foreclosure sale of U. S. bearer bonds and cash, the savings of 30,000 depositors, is required by every precept of equity and justice.

That such foreclosure sale be public, upon notice, fully advertised, and available to independent bidders, is essential to realization of even a fraction of the true value of the foreclosed $7,000,000.

The four conservator's notes contain a provision:

". . . This note shall be construed according to the laws of the state in which the principal office of the payee is situated." (Appx. I, p. 136.)

Appellee San Francisco Bank's principal office is in California.

Appellees commenced their own foreclosure[36] action in California State Courts. Appellees' complaint prayed:

---

[36]Appellants removed said foreclosure action from California State Court to the U. S. District Court, where it yet remains untried as 13979.

"For judgment foreclosing its aforesaid liens in the manner as provided by law; . . ." (Appx. II, p. 218.)

Thereby appellees invoked all California foreclosure proceedings, including California Civil Code §3011, which reads in part:

"§3011. [*Pledgee may foreclose right of redemption.*] *Instead* of selling property pledged, as hereinbefore provided, a pledgee *may foreclose* the right of redemption *by a judicial sale,* under the direction of a competent court; and in that case may be authorized by the court to purchase at the sale." (Emphasis added.)

and California Civil Code §2889 reads:

"§2889. [*Certain contracts void.*] All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void. [Enacted 1872.]"[37]

The terms of the 4 denied notes, *if valid,* permit appellees to secretly foreclose appellants' $7,000,000 of U. S. bearer bonds at an unknown time and place of sale, without any right of redemption.[38]

---

[37]In *Lowe v. Ozmun,* 3 Cal. App. 387 (Calif. 1906), the Court said at 393:

". . . The term 'private sale' comprehends something more than a mere taking over of the property by the pledgee at such price as he may elect to consider an offer. This is, in effect, but a declaration of forfeiture, an agreement for which is invalid under section 2889, Civil Code . . ."

[38]The provisions of the notes read in part:

". . . payee may, . . . sell . . . the whole . . . collateral security, without any relief to the maker from any valuation or appraisement laws . . . at any public or private sale, without demand, advertisement or notice of the time or place of sale or of adjournments thereof, all of which are hereby expressly waived. The maker further waives any and all equity or right or redemption, whether before or after sale hereunder, and agrees that upon such sale the payee may become the purchaser . . . free from any such right or equity of redemption . . ."

Thereby appellees would be the only bidder at their own secret foreclosure sale, from which they had excluded appellants and all independent bidders. Appellees would sell appellants' U. S. bearer bonds to themselves, at any price appellees set. But appellants would yet remain liable for any deficiency which appellees thus created, regardless of amount.

Such opportunity and temptation for coercion and fraud are oppressive and unconscionable. They are prohibited by both California and Federal foreclosure statutes.[39]

## C. INVALIDATION OF CALIFORNIA STATE FORECLOSURE AND QUIET TITLE STATUTES, AS REPUGNANT TO NOW REPEALED FEDERAL LAW, IS A SUBSTANTIAL QUESTION.

As we have shown, California State foreclosure and quiet title statutes have been invalidated in 1955 by the

---

[39]California Civil Code, §3005 reads:

"§3005. [*Sale of pledged property, manner of.*] The sale by pledgee, of property pledged, must be made by public auction, in the manner and upon the notice of sale of personal property under execution."

Sale of property under execution is regulated by California Code of Civil Procedure, §§692-694. §692 prohibits secret foreclosure sales. It reads in part:

"§692. [*Notice of sale under execution.*] Before the sale of property . . . notice thereof must be given as follows: . . .

". . . for not less than five days . . ."

§692a authorizes the debtor to demand written notice of time and place of sale. §693 penalizes sales made without giving the demanded notice. §694 regulates the hours and place of sale, and authorizes the debtor to:

". . . if present at the sale, . . . direct the order in which property, real or personal, shall be sold, . . . and the sheriff, or trustees, must follow such direction."

U. S. statutes are similar. Title 28 U. S. C. §2004 reads in part:

"2004. *Sale of personalty generally*

"Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise."

"§2001. *Sale of realty generally*

"(a) Any . . . [property] sold under any order or decree of any court of the United States shall be sold . . .

Court of Appeals as repugnant to the laws of the United States and to its 1952-53 opinions.[40]

But these 1952-53 opinions of the Court of Appeals were based upon Home Loan Bank law[41] *as it existed before amendment and repeal* by the Housing Act of 1954.

The Court of Appeals so states in *Fahey v. O'Melveny & Myers*, 200 F. 2d 420, 435[42]:

> "Underlying practically all of the issues posed on this appeal is an impressive body of statute law . . . contentions . . . of not only vital, but controlling importance on this appeal must find sanction and support in this legislation, or be rejected.

---

at public sale at the courthouse . . . *Such sale shall be upon such terms and conditions as the court directs.* (Emphasis added.) . . .

"(b) After a hearing, of which notice to all interested parties shall be given . . . the court may order the sale . . . at private sale . . . upon such terms and conditions as the court approves, . . . No private sale shall be confirmed at a price less than two-thirds of the appraised value. Before confirmation of any private sale, the terms thereof shall be published . . . at least ten days before confirmation. The private sale shall not be confirmed if a bona fide offer is made, under conditions prescribed by the court, which guarantees at least a 10 per centum increase over the price offered in the private sale."

Federal courts have uniformly, under their equity practice, enforced these and greater safeguards and protections at judicial foreclosure sales. *Gelfert v. National City Bank*, 313 U. S. 221, 231:

> "The control of judicial sales . . . by courts of equity and by legislatures in order to prevent sacrificial prices has a long history . . .
>
> ". . . to prevent the machinery of judicial sales from becoming an instrument of oppression . . ."

[40]*Home Loan Bank Board v. Mallonee*, 196 F. 2d 336; *Fahey v. O'Melveny & Myers*, 200 F. 2d 420; and *Fahey v. Calverley*, 208 F. 2d 197.

[41]*Federal Home Loan Bank Act*, Title 12 U. S. C. §§1422, *et seq.*; *Home Owners' Loan Act of 1933*, Title 12 U. S. C. §§1462-1464, *et seq.*; *National Housing Act*, Title 12 U. S. C. §§1724-1725, *et seq.*

[42]In its 2 opinions, *Home Loan Bank Board v. Mallonee*, 196 F. 2d 336; and *Fahey v. O'Melveny & Myers*, 200 F. 2d 420, the Court of Appeals makes over 40 separate references to, or quotations from, the now repealed and amended Home Loan Bank law. We quote only a few above.

> We refer to the 'Federal Home Loan Bank Act', Title 12, Chapter 11, U. S. C. A. . . . the Home Loan Bank Act which created the nationwide 'Federal Home Loan Bank System' must control . . . And as related legislation we may not overlook the here involved Federal Savings and Loan Insurance Corporation or the Home Owners Loan Act of 1933.[5] *et seq.*, creating the 'Federal Savings and Loan Insurance Corporation.' 'Home Owners' Loan Act of 1933', Title 12, Chapter 12, U. S. C. A."

---

"[5]Title 12, U. S. C. A. Subchapter IV, §1724."

And at page 444:

> "In the face of the plain legislative pronouncements we have noted we must and do conclude that Congress, and not the courts, may continue or end the System or any part of it; that Congress and not the courts may direct *how, where and when* a Home Loan Bank is to function . . . the tail would literally wag the dog if courts could exercise a power to compel or thwart action by . . . Congress in the field of control where Congress has so specifically and bluntly reserved to itself . . . the exclusive power to make effective decisions."

Further, at page 479:

> ". . . Nor has Congress since amended the Home Loan Bank Act . . . The simplest kind of an amendment would have achieved such a result . . ."

By the Housing of 1954, Congress exercised these powers so vehemently referred to in the prior opinions of the Court of Appeals. By the Housing Act of 1954, Congress specifically acted to prevent appellees foreclosure of appellant 8000 homeowners and 30,000 savings depositors, before trial and without redemption.

In 1954 Congress repealed and amended the very laws above quoted by the Court of Appeals, yet, in 1955 after such repeal and amendment, the Court of Appeals, by original mandamus and injunction, has yet enforced the repealed laws.

**D. NULLIFICATION OF CONGRESSIONAL RESERVED POWER TO CONTROL THE FEDERAL SAVINGS SYSTEM, IS A SUBSTANTIAL QUESTION.**

Nullification by the Court of Appeals of Congressional control over the Federal Savings and Loan System is a substantial question to the 12,000,000 savings depositors and homeowners, who are the mutual owners of 1,640 Federal Savings and Loan Associations, which are members of Federal Home Loan Banks throughout the Nation.

The charters of said Savings Associations and Banks, and the $867,478,000 of notes and debts of such Associations to such Banks, all contain express reservations that they shall exist and be foreclosed in accordance with Acts of Congress:

(1) "as hereafter amended" (terms of notes);

(2) "as they may hereafter be amended" (charters of Federal Savings and Loan Associations); and

(3) "such other acts as may be passed by Congress amending or supplementing" (charters of Federal Home Loan Banks).[43]

Enactment by Congress of the Housing Act of 1954, under said expressly reserved power of amendment, made such amendments instantly applicable to all existing debts, causes of action, and pending litigation.

*United States Mortgage Co. v. Mathews,* 293 U. S. 232, 237; *Sinking Fund Cases* (*Union Pacific R. R. v. U. S.,* 99 U. S. 700, 720; *Central Pacific R. R. v. Gallatin,* 99 U. S. 727, 730-731); *Helmholz v. Horst,* 294 Fed. 417 (C. A. 6, 1924); *White v. United States,* 270 U. S. 175.

---

[43]See footnotes 27, 28, 29 hereof for full text reservations in charters and notes.

**E. REPUDIATION OF THE POWER OF CONGRESS OVER JURISDICTION OF THE FEDERAL COURTS, IS A SUBSTANTIAL QUESTION.**

The power of Congress to at any time confer or withdraw jurisdiction of the Federal Courts is absolute. United States Constitution, Art. I, Sec. 8, Clauses 9, 18.

Such power includes pending, as well as future, actions in all Federal Courts. Unless pending actions and existing controversies are expressly mentioned and excepted, they are automatically included in every enactment of Congress concerning jurisdiction of the Federal Courts. *Missouri Pacific Railway Company v. United States,* 189 U. S. 274, 282; *Ex Parte Collett,* 337 U. S. 55, 71; *Smallwood v. Gallardo,* 275 U. S. 56, 61; *The Baltimore and Potomac R. Co. v. Grant,* 98 U. S. 398, 403.[44]

**F. SUBSTITUTION OF ORIGINAL WRITS OF MANDAMUS AND INJUNCTION FOR UNDECIDED TRIALS AND APPEALS IS A SUBSTANTIAL QUESTION.**

Actions are pending in the District Court unheard and untried.

Appeals are pending before the Court of Appeals docketed, but unbriefed and unargued.

Among the untried actions, is appellees' own foreclosure action 13979, filed by them, as plaintiffs, to foreclose a $7,000.000 denied debt against appellants' 30,000 savings depositors and the homes of 8,000 appellant homeowners. Among the unheard appeals are those taken by appellees

---

[44]The Courts of Appeal agree. *Federal Reserve Bank of Richmond v. Kalin,* 77 F. 2d 50, 51 (C. A. 4, 1935):

> ". . . It is clear that the grant of jurisdiction given by the statute applies to causes of action in existence at the time of its passage as well as to those subsequently arising. 'Statutes relating to practice and procedure generally apply to pending actions and those subsequently instituted, although the cause of action may have arisen before.' [citing authorities]."

*Connett v. City of Jerseyville,* 96 F. 2d 392, 400 (C. A. 7, 1938); *In re Monsen,* 74 F. 2d 411, 412 (C. A. 7, 1934); *Silurian Oil Co. v. Essley,* 54 F. 2d 43, 47 (C. A. 10, 1932); *Beatty v. U. S.,* 191 F. 2d 317, 320 (C. A. 8, 1951).

against quiet title judgments protecting said homeowners from foreclosure.

Both the untried actions and unheard appeals present issues never previously before the Court of Appeals or the Supreme Court.

Yet the Court of Appeals has, by its original writs of mandamus and injunction, decided the merits of said untried actions and unheard appeals, in advance of, and without any, trial or hearing. It has reversed the quiet title judgments protecting appellant homeowners against foreclosure. It has also reversed the order of the District Court preventing secret foreclosure of $7,000,000 of savings of 30,000 savings depositors.

To accomplish such reversals, without hearing or trial, the Court of Appeals has invalidated California State foreclosure and quiet title statutes as repugnant to now repealed laws of the United States.

Such substitution of mandamus and injunction, for trial and appeal, is in direct conflict with the decision of this Court in this litigation in *Ex Parte Fahey,* 332 U. S. 258, 259:

> "Mandamus, prohibition and injunction against judges are drastic. . . .
>
> "We find nothing in this case to warrant their use. . . ."

It is also in direct conflict with *Bankers Life & Cas. Co. v. Holland,* 346 U. S. 379, 383:

> ". . . whatever may be done without the writ may not be done with it. . . .
>
> "We adhere to the language of this Court in *Ex Parte* Fahey. . . ."

It is long settled that mandamus cannot be substituted for appeal.[45] Such substitution of mandamus for appeal

---

[45] *Roche v. Evaporated Milk Ass'n,* 319 U. S. 21, 30; *United States v. Rice,* 327 U. S. 742; *Ex Parte Park Square Auto, etc.,* 244 U. S. 412; *Ex Parte Harding,* 219 U. S. 363, 372; *Ex Parte Rowland,* 104 U. S. 604; *Ex Parte Roe,* 234 U. S. 70.

in direct violation of these decisions of this Court is a "substantial question."

**G. VACATING QUIET TITLE JUDGMENT FOR FAILURE TO EXHAUST UNAVAILABLE ADMINISTRATIVE REMEDIES, IS A SUBSTANTIAL QUESTION.**

Appellant homeowners' 1954 quiet title judgments have been vacated in 1955 by original writs of mandamus and injunction from the Court of Appeals. Such writs are based solely on 1952-53 prior opinions of the Court of Appeals, which in turn were made because of alleged failure to exhaust administrative remedies in 1946.

But in 1953, and again in 1955, administrative hearings were asked and denied.

Appellee Home Loan Bank Board refused to call or set any administrative hearing. It said:

> ". . . said petition is hereby denied for the reason that the Federal Home Loan Bank Board is without authority to grant the relief sought. . . ." (Order 8792, Home Loan Bank Board.)

As part of the quiet title judgments in favor of 8,000 homeowners against the $7,000,000 foreclosure by appellee Bank, the District Court found (Appx. II, p. 235):

> "None of the relief sought herein by said class representatives [the petitioners Association, homeowners, etc.], or any of them, was or could have been, granted or obtained by any administrative agency or bureau, process, or remedy."

Administrative remedies refused and denied cannot justify vacating quiet title judgments made to protect 8,000 homeowners against the $7,000,000 foreclosure appellee Bank Board refused to either hear or halt.

Section 503 of the Housing Act of 1954 expressly authorized such quiet title judgments against appellees. It reads in part:

> ". . . the association affected may, within thirty days after the service of said notice, apply to the

> United States district court for the district where the association is located for a declaratory judgment and an injunction or other relief with respect to such controversy, and said court shall have jurisdiction to adjudicate the same as in other cases and to enforce its orders. . . ."

Such Housing Act of 1954 became effective August 2nd, 1954. The quiet title judgments were entered September 16th, 1954, *after* the effective date of said Act. Yet the Court of Appeals, on the basis of *repealed* and amended Home Loan Bank law, and its 1952-53 opinions based thereon, nullifies both the *new* 1954 Act of Congress and quiet title judgments thereafter made.

Such refusal of both administrative and court relief is denial of due, or any, process,[46] and is a substantial question.

**H. NONE OF THE QUESTIONS PRESENTED BY THIS APPEAL WERE INVOLVED IN THE 1953-54 DENIALS OF CERTIORARI.**

The issues of this direct appeal from the Court of Appeals to this Court under Title 28 U. S. C. §1254(2) were not, and could not have been, any part of the 1953-54 denials of certiorari.

The major questions herein presented are created under, and by, the Housing Act of 1954. They could not be considered or decided by the Court of Appeals, or by this Court in the 1953-54 certiorari petitions, as they were decided before its enactment.[47]

The quiet title judgments protecting 8,000 appellant homeowners against appellee Bank's $7,000,000 fore-

---

[46]*Joint Anti Fascist v. McGrath*, 341 U. S. 123; *Hovey v. Elliott*, 167 U. S. 409.

[47]Certiorari was denied by this Court May 4, 1953 and April 26, 1954. The Housing Act of 1954 first became effective August 2, 1954.

closure of notes and trust deeds fully paid and disclaimed, were not made until September 16th, 1954.

No appeal in appellees' own foreclosure action 13979, commenced by them as plaintiffs, has yet been heard by either the Court of Appeals or by this Court. Foreclosure action 13979 has never been consolidated into any other action. Such appeals yet remain docketed, but unbriefed and unargued, before the Court of Appeals.

The pleadings alleging denial and refusal of administrative remedies, upon which said quiet title judgments were based, had not then even been filed.

Yet the Court of Appeals has decided untried issues by enforcing, in 1955, the 1952 (and prior) Home Loan Bank Board law, which was repealed and amended in 1954 by the Housing Act of 1954.

Such enforcement by perpetual injunction and original mandamus, of repealed laws after their repeal, is a substantial question.

## CONCLUSION.

California State statutes protecting appellants' 38,000 homeowners and savings depositors against secret foreclosure, have been invalidated as repugnant to repealed laws of the United States.

The jurisdiction of this Court over this appeal (under 28 U. S. C. §1254(2)), cannot be nullified by the lower Court's failure to expressly mention the California statutes which it invalidated.

This action is governed by the Housing Act of 1954, which, although specifically passed by Congress to protect these appellants, is denied all effect by the decisions of the Court of Appeals.

For the reasons set forth above, the decision of the Court of Appeals should be reviewed and reversed.

Respectfully submitted,

CHARLES K. CHAPMAN,
*Attorney for Appellant Long Beach Federal Savings and Loan Association,*

F. HENRY NECASEK,
*Attorney for Appellant Home Investment Company, as Representatives of a Class of Homeowners,*

JOHN D. MILLER and
CHARLES K. CHAPMAN,
*Attorneys for Appellant Title Service Company, as Trustee on Homeowners' Trust Deeds.*

## ADDENDA.

### APPENDIX REFERENCE.

A combined appendix, bound as separate volumes "A" and "B," also 9 copies of appendices "I" and "II" as filed with the Court of Appeals, were filed with certiorari applications October term, 1955, No. 611. They will be distributed herewith.

Appendix references herein are to such "A" or "B" or "I" or "II."

As these were *original* proceedings in the Court of Appeals, there was no printed record, nor was any testimony taken.

### OPINIONS BELOW.

#### United States District Court Opinions.

117 F. Supp. 259, is pages 35 to 98 of Appendix A, filed herewith.

122 F. Supp. 401, is pages 1 to 152 of Appendix I before Court of Appeals;

122 F. Supp. 960, is pages 189 to 258 and 301 to 382 of Appendix II, and pages 170 to 188 of Appendix I before Court of Appeals.

#### Court of Appeals Opinions.

225 F. 2d 349 in slip opinion form, is Appendix B filed herewith.